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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 697

FORT HOWARD PAPER COMPANY,
A CORPORATION,
DENNISON MANUFACTURING COMPANY,
A CORPORATION,
THE REYBURN MANUFACTURING COMPANY,
A CORPORATION,
Petitioners,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND SUPPORTING BRIEF.

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THE GUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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TABLE OF CASES CITED.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Your petitioners, Fort Howard Paper Company, Dennison Manufacturing Company and The Reyburn Manufacturing Company respectfully pray for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, to review a Final Decree entered by said Circuit Court of Appeals on August 20, 1946 affirming and enforcing a Cease and Desist Order of the Federal Trade Commission against these petitioners and others.

I.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

A. The Proceedings.

The Federal Trade Commission filed a complaint on October 7, 1941 against above petitioners, all other manufacturers of crepe paper, the National Crepe Paper Association of America and its manager. The complaint was in one count and charged a conspiracy to restrain price competition among the crepe paper manufacturers in violation of the Federal Trade Commission Act (15 U. S. C. A. 45). The conspiracy was alleged to consist in the fixing and maintenance of uniform delivered prices and the establishment and maintenance of pricing zones. Additional charges in the complaint were that the manufacturers arbitrarily averaged delivered costs in the pricing zones to accomplish uniform delivered prices; that the manufacturers filed price lists and invoices with the Association and agreed not to deviate therefrom; fixed uniform discounts, adopted uniform classification of customers for pricing purposes and adopted standardized practices regarding colors and sizes of crepe paper to facilitate identity of prices. (R. 2-8.)

After an extensive trial, the Commission made findings of fact (R. 336-347) and issued a Cease and Desist Order on April 22, 1944 that the respondents "cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, agreement, understanding, combination, or conspiracy between or among any two or more of said respondents, or between any

one or more of said respondents and others not parties to this proceeding, to do or perform any of the following acts or things:

"1. Establishing or maintaining uniform prices for crepe paper, or in any manner agreeing upon, fixing, or maintaining any prices at which crepe paper is to be sold.

"2. Establishing or maintaining delivered price zones or price differentials between or among such zones.

"3. Establishing or maintaining classifications of customers or prospective customers for pricing purposes.

"4. Adopting or maintaining uniform standards governing creping ratios, sizes or weights of crepe paper, or the sale of seconds or close-outs, with the purpose or effect of establishing or maintaining, or assisting in the establishing or maintaining of, uniform prices for crepe paper.

"5. Filing with respondent National Crepe Paper Association of America or respondent George J. Lincoln, Jr., or with any other agency or person, copies of invoices, or price lists showing current or future prices for crepe paper.

"6. Engaging in any act or practice substantially similar to those set out in this order with the purpose or effect of establishing or maintaining uniform prices for crepe paper." (R. 348-49.)

Individual Petitions to Review were filed in the Circuit Court of Appeals for the Seventh Circuit by each of the petitioners herein,—numbered 8601, 8604 and 8610, respectively and another Petition for Review, numbered 8606 was filed in said Circuit Court of Appeals on behalf of all the other respondents. (R. 349, 377, 391, 397.) Under date of July 12, 1946 the Circuit Court of Appeals handed down its Opinion affirming the cease and desist order of the Commission. (R. 433-45.) On August 20, 1946 said Circuit Court of Appeals entered its Final Decree affirming and enforcing the order to cease and desist. (R. 448-49.)

B. The Findings of the Commission.

Findings Five, Six and Seven only are important here. (R. 338-346.) These Findings show that the finding of conspiracy was based on activities that occurred in the crepe paper industry during NRA (see Commission's Finding Five (Tr. 338-342), during which time it is conceded that various agreements were made with respect to activity under the industry's Code of Fair Competition including the use of zones for pricing purposes. The paper industry generally uses similar zones for pricing purposes. (R. 61.) Petitioner Fort Howard Paper Company did not attend a single meeting of the Association during NRA. It did, however, at that time begin to use zones for pricing purposes which it has continued ever since. (115, 118.) Paragraph Five of the Findings concerns itself solely with activities during NRA. Petitioners took the position before the Commission and before the Circuit Court of Appeals that NRA activities were not a proper basis on which to find a conspiracy after NRA.

The Commission also made a finding that the NRA activities were continued by agreement after the termination of NRA (see Commission's Finding Six). (R. 342-345.) This Finding is based largely on the minutes of an Association meeting June 11, 1935, (which petitioners Fort Howard Paper Company and the Reyburn Manufacturing Company did not attend) which recites that the members *present* at the Association meeting agreed to continue to "operate under the same Labor Conditions and Fair Trade Practices as were in effect prior to the elimination of NRA, at least until such time as a definite and specific policy had been adopted by the administration." Petitioners took the position that activities of the Association and its members on June 11, 1935 were not illegal and

in any event subject to the same exemption from the Anti-trust Laws as earlier activities during NRA.[1] Fort Howard Paper Company attended only five meetings of the Association, all after NRA. The Commission referred to only one of these in its Findings (see reference to Exhibit 18 in Finding Six), and one other in its Brief before the Circuit Court of Appeals. The minutes of those two meetings were introduced as Exhibits 15 and 18. Fort Howard Paper Company takes the position here, as it did before the Commission and the Circuit Court of Appeals, that there is no evidence in these minutes or elsewhere to connect Fort Howard with any conspiracy whatever or particularly to fix uniform prices or establish or maintain pricing zones as charged in the complaint.[2] No other Association meeting mentioned in Finding Six was attended by Fort Howard Paper Company. The other meetings referred to in the Finding do not show any conspiracy to fix prices or zones. They refer to activities in which Fort Howard Paper Company was not even engaged, *i. e.*, classifying customers, which Fort Howard never did; making crepe paper in numerous creping ratios, which Fort Howard never did; selling flooring crepe in packages, which Fort Howard never did. (R. 343-345.)

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[1] It should be noted that Section 5 of the N.I.R.A. provided that any action under a Code should be exempt from the Anti-trust Laws while the act was in effect and for sixty (60) days thereafter (48 Stat. 195, 198). The Schechter decision (295 U. S. 495) was on May 25, 1935 and on June 14, 1935 Congress repealed the provisions of the Act delegating power to the President to prescribe codes but in the same act provided that the exemption from the Anti-trust Laws should continue with respect to agreements relating to Labor conditions and unfair competitive practices which offend against existing laws (49 Stat. 375).

[2] Exhibit 15 shows no suggestion of any agreement whatever. Exhibit 18 refers to a motion to adopt a simplified *form* of price list. Other evidence shows this had nothing to do with fixing prices (R. 142) and a comparison of price lists in the evidence shows that no uniformity in *form* of price lists was ever accomplished.

Petitioners Dennison and Reyburn resigned from the Crepe Paper Association in 1939, nearly two years before the Commission filed its complaint and sixteen months before the Commission had even started its investigation. These petitioners contend that none of their activities after NRA shows them to be a party to any conspiracy charged in the complaint and that in any event their resignation from the Association in 1939 should bar any proceedings based on earlier activities.

C. Evidence Involving Several Individual Manufacturers.

There is a considerable volume of evidence showing private arrangements on prices and other matters among certain members in the crepe paper industry. These arrangements were unknown to and were not participated in by Fort Howard, Dennison or Reyburn in any way. Much of the Commission's Brief in the Circuit Court of Appeals was devoted to a statement of these private arrangements. Petitioners took the position before the Commission and before the Circuit Court of Appeals that this evidence of private price agreements was incompetent as a basis for a finding of conspiracy against Fort Howard, Dennison and Reyburn. The Commission's Findings do not differentiate between the manufacturers so there is no way of telling from the Findings what the particular activities of any particular manufacturer were. The manufacturers who engaged in these private arrangements did not defend those activities before the Circuit Court but merely contended that the order of the Commission was vague and broader than it should have been to stop those activities. See Statement of Points in Circuit Court of Appeals in Case Number 8606. (R.396.)

D. Circumstantial Evidence.

The finding of conspiracy is really based on an inference from the following circumstantial evidence:

a) The published prices of the various manufacturers are generally identical. (R. 45, 85, 99-100.) Prices are generally made f.o.b. mill freight allowed. That means the buyer pays the freight and remits the balance of the f.o.b. mill price to the seller. Thus, the f.o.b. mill price is the delivered cost to any buyer in the zone.

b) Copies of these published prices were filed with the Association and disseminated by it to members of the industry during NRA and occasionally by individual companies since NRA. The evidence shows no regular filing since NRA but it has been done occasionally, usually in response to a request by the Association for some company's price list in order that the Association could, in turn, send it to some other manufacturer who had asked the Association to secure it. (R. 49-50, 87, 98, 119.)

c) Copies of invoices have, at times, been filed with the Association by some members of the industry. The evidence shows such information was not disseminated to members, was filed sporadically and was for the purpose of enabling the Association to make studies about the substantial decline in the use of crepe paper. (R. 48, 63, 124, 149.)

d) The industry, after NRA, continued to use the zones for pricing purposes which had been established during NRA. (R. 115, 108, 290, 75, 82, 97.) See Commission's Finding Seven which made general findings of conspiracy and referred to the filing of price lists and invoices and the use of zones as being "in furtherance of such conspiracy" and "in further pursuance of their agreement, * * *." (R. 345 and 346.)

Petitioners contended in the Commission and in the Circuit Court of Appeals that no inference of conspiracy could be drawn from the foregoing circumstances because:

(1) The evidence shows without contradiction that crepe paper is completely standardized (R. 43, 44, 127) and that buyers refuse to pay more in total costs for crepe paper delivered from one company than from another. (R. 100, 108-09, 195, 89-90, 214, 224-5, 164.) The Commission failed to make any finding regarding this uncontradicted evidence.

(2) The evidence showed without contradiction that buyers of crepe paper are fully informed professional buyers, usually purchasing agents for large companies (R. 113), buying crepe paper to use in window advertisements and that despite differences in freight rates from manufacturers to a particular buyer, the buyer will not pay more for one brand of crepe paper than another. The Commission failed to make any finding of this uncontradicted evidence.

(3) The evidence showed repeated occasions when one manufacturer would get out a new price list lowering prices. Within a short time all other manufacturers met these new lower prices. (R. 253-55.) The evidence was uncontradicted that they could not continue to sell unless they met the lowest price named by any seller. The evidence showed one or more occasions when a manufacturer endeavored to initiate a price rise but could not accomplish it because other manufacturers continued to sell at the lower prices. (R. 126.) The Commission made no finding with respect to this uncontradicted evidence.

(4) The evidence contains positive uncontradicted testimony that the use of zones which originated during NRA does not produce the frequent uniformity in price but that the standardization of the product and refusal of buyers to pay more for one brand than another, does. (R. 118, 148.) The evidence is uncontradicted that the use of zones was continued after NRA not because of any agreement but

because it was an established practice familiar to the buyers of crepe paper and there was no reason for any manufacturer to change such established use of zones. (R. 118, 108, 290.) The Commission made no finding of this uncontradicted evidence.

(5) The evidence showed without contradiction that before zones were used, each manufacturer was forced to meet the lowest total cost at destination quoted by any other seller. The same uniformity existed before the use of zones as after. (R. 150-151.) The Commission made no finding with respect to this uncontradicted evidence.

(6) There was direct and positive uncontradicted evidence from every respondent in this case that it had not made any agreement with Fort Howard Paper Company with respect to prices, zones or any other matters relating to production and sale of crepe paper. (R. 142, 258, 79, 95, 107-08, 172-74, 215, 95.) The Commission made no finding of this uncontradicted evidence.

(7) The evidence showed without contradiction that the manufacturers were not under any agreement to publish or adhere to price lists and frequently sold lower. (R. 142, 101, 45, 228.) The Commission made no finding with respect to this uncontradicted evidence.

(8) The evidence is clear that from the date of Dennison's resignation from the Association in 1939, it remained entirely disassociated from the Association and its members and other manufacturers of crepe paper, and Dennison has pursued an independent course of action. (R. 291, 333, 288, Com. Ex. 42-a-c.)

Dennison is the outstanding manufacturer of crepe paper and since at least as early as 1906 it had established its own standards as to size, colors, weight, crepe ratio, etc., which standards have not varied materially during the past fifteen years. (R. 451.) The Commission made no finding with respect to this uncontradicted evidence.

II.

JURISDICTION TO REVIEW.

Section 5 (c) of the Federal Trade Commission Act makes specific provision for review by the Supreme Court upon certiorari. (15 USCA 45 (c), 28 USCA 347, 350.) This petition is filed within the time required by said statutes, *i. e.* within three months after the entry of the decree of the Circuit Court of Appeals.

III.

THE QUESTIONS PRESENTED.

Broadly stated, the question is whether there is substantial evidence in the record to support the finding of conspiracy. More particularly the questions are:

1) Does frequency of identical price by different sellers of a completely standardized commodity, such as crepe paper, to informed buyers support an inference of conspiracy in the face of uncontradicted evidence denying conspiracy?

2) Does frequency of identical price by different sellers of a completely standardized commodity, such as crepe paper, to informed buyers support an inference of conspiracy in the face of uncontradicted evidence that buyers will not pay more for one brand of crepe paper than another?

3) When an entire industry began the use of pricing zones during NRA, pursuant to its Code of Fair Competition, is the continued use of such zones after NRA substantial evidence on which to base an inference of conspiracy to use zones in the face of uncontradicted evidence that the continued use of the zones is not pursuant to any agreement but because the selling method is established and convenient

to buyers and sellers and similar to the selling method used in the paper industry generally?

4) When an entire industry began the use of pricing zones during NRA, pursuant to its Code of Fair Competition, is the continued use of such zones after NRA substantial evidence on which to base an inference of conspiracy to fix uniform prices for crepe paper in the face of uncontradicted evidence that the use of zones does not bring about uniform prices but that the standardization of the product and the refusal of buyers to pay more for one brand than another, does?

5) Is an inference of conspiracy to fix uniform prices for crepe paper supported by evidence that the members of the industry customarily issue price lists and that the price lists frequently show the prices of all sellers to be identical in the face of uncontradicted evidence that there is no agreement on uniform prices but that general uniformity is inevitable because the product is completely standardized?

6) Does the occasional filing of price lists, with a Trade Association and dissemination thereof by the Association to the members of the industry, support an inference of conspiracy to fix prices in the face of uncontradicted evidence that there is no agreement or obligation to adhere to the price lists and where the evidence is uncontradicted that lower prices are often made?

IV.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

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1. The legality of the use of zones for pricing purposes is made questionable by the decision of the Circuit Court of Appeals. The Supreme Court should settle this important business question.

2. The decisions of the Federal Trade Commission and the Circuit Court of Appeals are based on inferences which petitioners contend were completely rebutted. The Supreme Court should decide the extent to which such common business practices may be held illegal by inference.

3. The decisions of the Commission and the Circuit Court of Appeals were based on improper inferences contrary to long announced rules of the Supreme Court as to the weight to be given inferences.

4. The decisions of the Commission and the Circuit Court of Appeals based on rebutted inferences are in conflict with decisions of the Supreme Court.

5. The Supreme Court should exercise its supervisory power by reviewing this case because of its great importance to business men other than the parties to this suit.

6. The Circuit Court of Appeals' decision is really based on an inference of conspiracy from the fact of frequent uniformity in price and use of zones. For example, the Circuit Court of Appeals said, "We think the artificiality and arbitrariness of the zone structure is so apparent it cannot withstand the inference of agreement." Also "Dennison and Reyburn place great reliance upon their withdrawal from the Association long before the Federal Trade Commission's investigation was begun. Such withdrawal, while of some persuasive import, does not negative its continued adherence to all the trade practices and zone systems theretofore in existence, which resulted in substantially identical delivered prices." Thus the Circuit Court of Appeals allowed inference to override positive uncontradicted testimony that the zones were not being used pursuant to agreement and that use of zones was not the thing that produced frequent identical prices. So far as the propriety of inference from uniform

prices is concerned the Circuit Court of Appeals has already repudiated the doctrine in its later decision in the Cement case. (*Aetna Portland Cement Co., et al.*, v. *F. T. C.*, C. C. A. 7, Sept. 20, 1946; not yet reported.)

7. Paragraph 6 of the Cease and Desist Order (*ante*, p. 3) shows that the purpose of the Commission is to outlaw any method of selling crepe paper which would result in identical prices. The war on identical prices has become a fetish of the Commission. A similar order prohibiting any selling method resulting in identical prices was issued by the Commission against the cement industry and the Circuit Court of Appeals pointed out that the order "leaves no room for doubt but that the purpose of the Commission is to outlaw * * * any and all price systems * * * which results in identical prices * * *." *Aetna Portland Cement Company, et al.* v. *Federal Trade Commission*, C. C. A. 7, September 20, 1946 (not yet reported). The Supreme Court should review this case because of the importance to many other industries of the Commission's attack on uniform prices.

Dated November 15, 1946.

Respectfully submitted,

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THE REYBURN MANUFACTURING COMPANY,
A CORPORATION,
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vs.

FEDERAL TRADE COMMISSION,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION BELOW.

The opinion of the Circuit Court of Appeals (R. 433-45) is reported in 156 F. 2d 899.

II.

JURISDICTION OF SUPREME COURT OF UNITED STATES.

Jurisdiction of this court is invoked under 15 U. S. C. A. 45 (c) and 28 U. S. C. A. 347, 350.

III.

STATEMENT OF THE CASE.

A concise statement of the case is made in the Petition (*ante*, pp. 2 to 9).

IV.

SPECIFICATION OF ASSIGNED ERRORS.

(a) The Circuit Court of Appeals erred in entering its Final Decree affirming and enforcing the order of the Commission to cease and desist.

(b) The Circuit Court of Appeals erred in failing to vacate and set aside the order of the Commission to cease and desist upon the Petitions to Review.

V.

ARGUMENT.

A. Frequent Uniformity in Prices of Various Manufac turers Results Because Crepe Paper of All Manufacturers Is Alike and Buyers Refuse to Pay More for One Brand Than for Another.

The evidence to support the foregoing proposition is clear and uncontradicted. The consequence is inevitable that the lowest price quoted by any manufacturer must be met by all other manufacturers. This results in frequent uniformity although the evidence shows occasionally a manufacturer will cut below the published price in order to be sure of getting a particular order. Prices of different manufacturers are learned without difficulty from sellers' representatives in the field and from customers. There is direct evidence in the record that there was no agreement or obligation to abide by published prices and that the use of zones in the industry is not the thing that brings about frequent uniformity. The method of selling f.o.b. mill freight allowed produces no phantom freight to any seller but involves constant freight absorption to meet competition.

B. Meeting or Following a Competitor's Prices Is Not Illegal Unless Done by Conspiracy or Agreement.

U. S. v. *Standard Oil Co.*, 47 F. 2d 288, 316.

U. S. v. *International Harvester Co.*, 274 U. S. 693, 708.

Cem. Mfrs. Prot. Assoc. v. *U. S.*, 268 U. S. 588.

Aetna Portland Cem. Co., et al. v. *F. T. C.*, C. C. A. 7, Sept. 20, 1946 (not yet reported).

C. An Inference of Conspiracy or Agreement Cannot Be Drawn From the Fact of Frequent Uniformity of Prices and Marketing Methods in the Face of Positive, Direct Testimony Denying the Existence of Any Such Conspiracy or Agreement.

While the Federal Trade Commission has the right to draw inferences from the facts it cannot properly draw inference from only a part of the facts and ignore other facts which rebut the inference. Its right to draw inferences is subject to control of the court to say whether the inferences as drawn were legally rebutted by the evidence. They cannot override positive, contrary evidence. It is for the reviewing court to say whether the Commission's findings are supported by substantial evidence and whether its conclusions are reasonably inferable from the evidence. Evidence which equally supports inconsistent inferences is not substantial. *National Labor R. Bd.* v. *Sun Shipbuilding and Drydock Co.*, 135 F. (2d) 15, 25, 27-28. In *Cem. Mfrs. Prot. Assoc.* v. *U. S.*, 268 U. S. 588, 602, the court refused to draw an inference of illegality from uniform prices and marketing practices, pointing out that these were not inconsistent with individual action and in *U. S.* v. *Standard Oil Co.*, 47 F. 2d 288, 316, the court inferred uniform prices were the result of individual action refusing to infer illegal restraint of competition. The positive and uncontradicted testimony that there was no conspiracy with respect to prices or zones or other activities makes it improper to infer conspiracy.

Penna. R. Co. v. *Chamberlain*, 288 U. S. 333, 339.
U. S. F. & G. Co. v. *Des Moines Bank*, 145 F. 273.

D. Acts and Statements of Other Manufacturers Are Not Binding Upon Petitioners Unless It Is Shown by Independent Evidence That Petitioners Are Engaged in a Conspiracy With Those Other Manufacturers.

The private arrangements and agreements of some of the crepe paper manufacturers is not competent evidence against petitioners since they did not participate in those private arrangements or know anything about them until the trial of this case.

Kuhn v. *U. S.*, 26 F. 2d 463.
Nibbelink v. *U. S.*, 66 F. 2d 178.

E. Filing of Prices With a Trade Association or Distribution of Price Lists to Competitors Is Not Illegal Unless Done as Part of an Agreement to Be Bound by Such Prices.

The filing of price lists with the Association and distribution by it to manufacturers was done occasionally, even after NRA but not by all manufacturers. The evidence shows it was usually in response to a request of somebody for a price list of some competitor. The evidence is uncontradicted that the manufacturers had no agreement to charge identical prices or to furnish each other with price lists. Frequent uniformity in prices resulted from the standardization of the product and the fact that buyers will not pay more for one brand of crepe paper than another.

Salt Producers Assn. v. *Federal Trade Commission*, 134 F. 2d 354, 259.
Sugar Institute v. *United States*, 297 U. S. 533, 601-2, 602-4.
Maple Flooring Assn. v. *U. S.*, 268 U. S. 563, 582-84.

F. Petitioners Use Price Zones Because This Is a Convenient, Established and Satisfactory Way to Market the Product. They Do Not Use Zones by Reason of Any Agreement.

The use of zones by an industry is not illegal *per se* but only when the result of conspiracy or agreement.

Salt Producers Assn. v. *FTC*, 134 F. 2d 354, 358.

G. Petitioners Have Not Agreed With Competitors to Classify Customers or Standardize Practices in the Industry.

The evidence shows without contradiction that Fort Howard never classified customers, made its crepe paper according to one creping ratio only and did not engage in many of the special activities of many of the other manufacturers. Practically all of the recitals in the various minutes of Association meetings concerned matters with which Fort Howard Paper Company was not engaged. Dennison and Reyburn resigned from the Association in 1939 and had nothing to do with its activities since. The finding of conspiracy against them could be based on nothing but inference from the fact that they continued to use the zones which were used by all of the rest of the industry and that their prices continued to be frequently identical with other sellers.

H. Agreements Made Under a NRA Code Are Not a Proper Basis From Which to Infer Present Agreement in Restraint of Trade.

If the agreements during NRA, set out in the Commission's Finding Five, are disregarded, there is no substantial evidence left in the record to support the finding of conspiracy.

Section 5 N. I. R. A. 4 Stat. 195, 198.
Eugene Dietzgen Co. v. *FTC*, 142 F. 2d 321, 328-29.
Aetna Portland Cement Co., et al. v. *FTC*, CCA 7 Sept. 20, 1946 (not yet reported).

I. Whether There Is Price Competition in the Crepe Paper Industry Is Not the Issue in This Case. The Sole Issue Is Whether There Is Conspiracy or Agreement by Competitors to Restrain Competition.

The Anti-trust Laws do not require competitors to charge different prices. The laws merely prohibit agreements to restrain competition (Sherman Act), discrimination that tends substantially to lessen competition (Clayton Act), and unfair methods of competition (Federal Trade Commission Act).

U. S. v. *U. S. Steel Corp.*, 251 U. S. 417, 451.
Swift & Co. v. *U. S.*, 196 U. S. 375, 400.

J. Comments on Opinion Below.

There is very little to criticize in the Opinion of the Circuit Court of Appeals as far as its factual statements are concerned. There is an improper inference in the Opinion that crepe paper manufacturers would always increase their prices if any one manufacturer announced a price increase by published price list or otherwise. The

record does show that there have been occasions when some one manufacturer announced a price increase and it later was followed by others. On the other hand, it also shows that price increases have been initiated which failed because one or more manufacturers continued to sell at lower prices, thus forcing the one who had attempted to initiate a price increase to again sell at lower prices.

The Circuit Court of Appeals stated that the finding of conspiracy

> "was not a finding based simply on inference. It was a finding of fact based on actualities. The existence of substantial similarity in delivered prices to zoned territories having identical zone price differentials by six manufacturers located at different places, was not a happenstance. Nor, looking at the situation objectively, was it the inevitable and unescapable result of keen competition in a standard product of invariable qualities. To be sure, a keen competitor strives to meet a lowered price of a competitor immediately upon becoming aware of it, but he does not strive to and invariably match a price which is *higher* than that at which he needs profitably to sell, unless by express, or tacit agreement, all manufacturers have found existence to be less strenuous for all concerned by merely setting a price for three zones in the whole United States, and except for such (identical) zone differentials, discarding and ignoring the substantial item of freight. We are unable to comprehend a manufacturer's disdain of a natural advantage utilizing the same to gain local business, unless he were indoctrinated with the belief (or forced by superior economic competitors to align himself to concerted action of identical delivered prices) that elimination of all competition was economically preferable.
>
> "True, convenience of the use of zones is not to be denied, but mere convenience does not induce competitors approximately one-third of the nation's width apart to consider themselves concentric in mapping of

zones. One glance at the three zone map for bulk crepe will show the artificiality of the zone structure and intention to obviate any natural advantage of location from price determination. Two of the companies are located in Wisconsin, and the western limits of the zone run merely to the Mississippi River while the eastern boundary runs to the Atlantic Ocean. Zone I is obviously drawn to include all manufacturers and put them on a par. The unfairness of this is shown by the fact that a purchaser in the adjacent states of Minnesota and Iowa would pay the additional fixed price differential to that paid by purchasers in the remote New England states. The zoning system here employed is an enormous exaggeration of the basing point system, having *nineteen states* as the focal basing point. The packaged crepe zone system split the nation (but not into equal halves) into two parts."

The foregoing quotation shows that while the court thought its Opinion was not based simply on inference yet it really was. The court could not understand why all manufacturers would use the zones unless it was due to some agreement. The court, therefore, guessed that there was a conspiracy and allowed its guess to outweigh the uncontradicted testimony to the contrary. Even if the zones are artificial and arbitrary, that does not, in itself, prove that the manufacturers using them are doing it by agreement. The question is not what might be the most desirable or the best way to sell in the court's opinion but simply is it proper to draw an inference of collusion because the court thinks the selling methods are arbitrary despite the fact that there is uncontradicted testimony denying the conspiracy?

Abolition of the zones could not give any manufacturer the local advantage which the Circuit Court of Appeals seems to imagine. If Fort Howard, for example, reduced

its prices, its competitors would still meet those prices, unless they were reduced so low that competitors could no longer come into the area near Fort Howard's mill. How low that would have to be does not appear in the evidence. Fort Howard has a competitor at Appleton, Wisconsin, only a few miles from Fort Howard's mill at Green Bay, Wisconsin. It is difficult to imagine that Fort Howard could possibly reduce its prices enough to keep that competitor out of its nearby area. Freight in a product like crepe paper is not very substantial. All crepe manufacturers sell in all parts of the United States. The possibility of one competitor maintaining a local advantage for itself is more theoretical than real. The refusal of manufacturers to go into a price cutting contest for such local monopoly as might result is hardly evidence of collusion. It is rather evidence of the use of good judgment by the manufacturers to preserve their businesses. The price differences in the three zones are not substantial. Prices in zone 2 are 20¢ higher per gross of paper folds than in zone 1 and in zone 3 40¢ higher per gross than zone 1. These increases approximate the average differences in freight charges in the respective zones. (R. 147.)

It is true that the industry sold without the use of these zones prior to NRA and could sell again without the use of zones, if required to do so. But, even before zones were used, there was the same frequent uniformity in prices because of the standardization of the product. Even if the court felt that zones should not be used, the order of the Commission is far broader than a mere prohibition of the use of zones, since its purpose is to defeat any method of selling which results in uniform prices. We believe from what has been said heretofore that this court will recognize that frequently uniform prices are inevitable if competition is to be permitted. The inference of agreement drawn

by the Commission and by the court below from the mere use of zones was, we believe, improper.

Respectfully submitted,

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